

## American Arbitration Association

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In the matter of Arbitration between \*

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IAFF LOCAL 863 \*

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And the \*

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CITY OF NEWTON \*

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CASE NUMBER:

11 390 00347 09

In accordance with the Collective Bargaining Agreement between the City of Newton and IAFF Local 863 the undersigned was designated as Arbitrator under the auspices of the American Arbitration Association to hear and decide the following:

### Stipulated Issues

1. Is the grievance procedurally arbitrable?
2. If so, did the City have just cause to suspend Anton Cox for one day? If not, what shall be the remedy?

Appearing for the Union was Joseph Donnellan, Esq. Also appearing for the Union were, Lt. Anton Cox, grievant, Eddie Melendez, Local Vice-President, Thomas McGary, Grievance Chair and Richard Toli, Grievance officer

Appearing for the City was James M. Pender, Esq. Also appearing for the City was Chief Joseph E. LaCroix, and Deputy Chief Paul Chagnon.

A hearing was held on January 26, 2010, at the Newton City Hall at which representatives of the Parties appeared. They had full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Witnesses were sworn. Briefs were submitted on October 22, 2010

### **Relevant Contract Language**

#### **Article V, Grievance Procedure and Arbitration, (in part)**

5.01 The term “grievance” shall mean only an alleged violation by the CITY in interpretation or application of one or more specific clauses of this AGREEMENT.

STEP 1 – The grievance shall be presented orally to the employee’s or employees’ Commanding Officer, if other than his/her immediate supervisor, within thirty (30) calendar days of the occurrence of events giving rise to the grievance or, within (30) calendar days of the time the affected employee(s) should have been aware of such, whichever time period is later and the Commanding Officer shall attempt to adjust the grievance informally. A written report of the Commanding Officer’s decision resolving the grievance shall forthwith be made to the Chief of the Fire Department through his/her Division Commander. If within **five days (5)** from the receipt thereof the Chief of the Fire Department does not overrule or modify said decision, it shall stand. If it is modified or overruled by the Chief of the Fire Department his/her decision shall be subject to the remaining provisions of this Article.

5.02 (in part) The Arbitrator shall be without power to alter, add to or detract from the language of this AGREEMENT. He/she shall have no power to recommend or order any right or relief for any period of time prior to the effective date of this AGREEMENT. He/she shall submit in writing his/her findings of fact and award within thirty (30) days after the conclusion of testimony and argument or as soon as practicable thereafter. The decision of the arbitrator shall be final and binding on both parties. The fees and expenses of the arbitrator shall be shared equally by the parties.

5.04 Employees shall not be disciplined, suspended, dismissed, removed or terminated except for just cause.

#### **Article VI, Management Rights (in part)**

6.01 Except where such rights, powers, and authority are specifically relinquished, abridged, or limited by the provisions of this contract, the CITY has and will continue to retain, whether exercised or not, all of the rights, powers and authority heretofore had by it, and except where such rights, powers and authority are specifically relinquished, abridged or limited by the provisions of this contract it shall have the sole rights, responsibility and prerogative of management of the affairs of the CITY and direction of the working forces, including but not limited to the following:

D. To prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirements of the CITY, provided such rules and regulations are made known in a reasonable manner to the employees affected by them.

## Arbitrability

### **The City**

The City argues that the grievance in question was untimely filed and thus not arbitrable and must be dismissed.

The City maintains that under Article 5 of the Collective Bargaining Agreement, (CBA) a grievance shall be presented to the employee's Commanding Officer within thirty (30) calendar days of the occurrence of event giving rise to the grievance. If the grievance is not resolved within six (6) days following that presentation, it is to be filed, in writing, to the Chief of the Fire Department. (Jt. 1) Hence, the City argues, the CBA requires that the Union file a written grievance within 36 days after the event giving rise to the grievance occurred.

In this incident, the General Order suspending the Grievant was issued on October 23, 2008. Therefore, the grievance should have been filed no later than thirty-six days following, or November 28, 2008. The actual grievance was filed on December 22, 2008, twenty-three (23) days after the deadline. (Jt. 12)

The City rejects the Union's argument that the contractual deadline for filing the grievance had been extended as a result of the conversation between the Grievant and Chief LaCroix that occurred when the Chief called the Grievant and informed him of his decision to issue the suspension. The Union argued that the Grievant ask the Chief for an opportunity to discuss his decision and that the Chief agreed. (T. of Cox) This agreement, the Union argues was tantamount to agreeing to an extension of filing the grievance.

The City argues that at no point in the testimony was any explicit mention made of extending the time limits, either by the Grievant or Chief LaCroix, let alone any agreement to an extension. It maintains that the Grievant also made no attempt to follow up with the Chief to schedule such a meeting.

For these reasons, the City asks that the grievance be dismissed based on failure to meet the contractual deadlines for filing the grievance.

### **The Union**

The Union argues the grievance was filed in a timely manner and the grievance should not be dismissed.

It maintains that the Grievant was promised a meeting with Chief LaCroix to discuss his suspension and that he delayed filing any grievance pending the outcome of that meeting. It argues that it was the experience of the Grievant, during the period when he was President of the Local, in 2002 and 2003, that informal meetings with the Chief to resolve issues were common. It was only after it became evident that a meeting would not occur did the Grievant ask the Union to file the grievance. (T. of Cox)

The Union argues that the Grievant had informed the Local President that the Chief had promised a meeting and the President had responded that he would wait to let the parties meet before doing anything else. (T. of Cox)

Finally, citing *Mode O'Day, 1 Lab. Arb.* (BNA) 490, 494 (Cheney, 1946), the Union argues that a forfeiture provision must be expressly stated in the CBA if there is to be a forfeiture for delay in filing. It cites, "*In order for the arbitrator to find that Employer has proven that forfeiture is appropriate here, the Employer must prove that it is the unmistakable intent of the parties to the contract to require forfeiture for a delay in filing.*"

The Union argues that the grievance was filed in a timely manner and that the case should not be dismissed on the ground of procedural arbitrability.

### **Discussion and Opinion**

Failure to file a grievance in a manner consistent with the timelines stated in the grievance article of the CBA is a serious issue and can result in dismissal of the grievance.

In this case, Article V of the CBA requires that a grievance be filed orally within thirty (30) calendar days of the event giving rise to the grievance, and that if it is not resolved within five (5) days following, it be filed in writing with the Chief of the Fire Department. (Jt. 1) In this instance, General Order #789 suspending the Grievant for one day was issued on October 23, 2008. (Jt. 11) The grievance that was filed in response to that order was filed on December 22, 2008, a full 59 days following the issuing of the order.

The union maintains that the reason the grievance was filed late was that there was an agreement between the Chief and the Grievant to meet and discuss the Chief's actions and that period for filing a grievance would be extended. The testimony presented at the hearing contradicts that argument.

When asked, under direct testimony if he ever had an agreement with the Grievant to allow him to delay filing a grievance, the Chief testified, "*I don't ever remember any agreement.*" When asked again if he had any discussion about allowing the Union to delay filing a grievance on this matter, he again testified, "*I don't believe so. I don't recall that.*" (T. of LaCroix. p73)

When asked under cross examination if, in his conversation with the Grievant informing him of his suspension, the Grievant asked him for an opportunity to discuss his suspension with him, he replied, "*He may have. I'm not going to say he didn't, but I don't recall it.*"

At no point in the Chief's testimony did he recall agreeing to an extension of the time limits for filing a grievance pending a meeting with the Grievant.

The Grievant's testimony indicated that he did request a meeting with the Chief and that the Chief had agreed. His testimony regarding any extension is less clear. Under direct

testimony, the Grievant never mentioned any specific request for an extension of the time limits, but testified that based on his past experience as Local President, *"I was under the impression, my impression was that before this, that as much as that was his decision, that before this thing was actually finally said and done that I'd be given an opportunity to speak to him about it, and we could discuss, because the decision didn't seem very consistent to me, and I wanted to make sure that, you know, whatever logic he was using or whatever facts of the case he was using that he, in fact, had them correctly."*(T. of Cox, p 236)

Under cross examination, he again testified that he had requested a meeting with the Chief and that the Chief had agreed. When asked specifically if he mentioned anything to the Chief about suspending the contractual grievance process until they had a chance to meet, he testified, *"No, I didn't say that."* When asked if the Chief had offered to suspend the grievance process, he again testified *"No."* When asked if he had sent the Chief anything in writing or by email asking if he would suspend the process, he testified that *"I didn't, but I believe I had a discussion with the Union president, informing him of what the Chief had said promising me a meeting. And he said 'OK, I'll let you guys meet, 'or something like that, 'before we do anything else.'" When asked if he knew whether the Union president had sent anything to the Chief asking to suspend the grievance process, he replied, "I don't know. I don't know."* (T. of Cox, p 259 – 261)

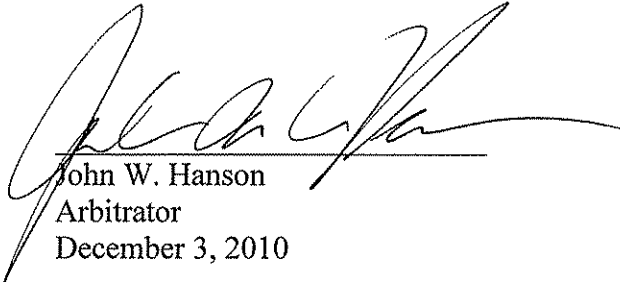
While it seems clear that the Grievant and the Chief had some understanding that a meeting would occur, the testimony is clear that there was never an explicit or even implicit agreement to suspend the grievance time lines, nor was there ever an explicit request to do so. Assumptions were made and they proved unfounded. The Grievant in this case is not unfamiliar with the Collective Bargaining Agreement, having served two years as Union president. He was aware of the time limits in the Agreement, but yet took no steps to protect his rights to file a grievance by either filing in a timely manner or obtaining an explicit agreement to extend the time limits.

A thirty-day limit on the time a grievance should be filed following the event which led to the grievance is not unreasonable and does not impose an undo burden on the Union or its members. The event in this case, a suspension, was clearly grievable. If the Grievant wanted a meeting with the Chief, he could have had it after a formal filing. There is no reason why the grievance could not have been filed within the time allowed, or an extension requested.

The grievance was not filed within the time limits outlined in Article V. The grievance is dismissed.

**Decision**

The grievance was not filed within the time limits outlined in Article V. The grievance is dismissed.



John W. Hanson  
Arbitrator  
December 3, 2010